



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: SEPTEMBER 06, 2022

IN THE MATTER OF:

Appeal Board No. 623816

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determinations, disqualifying the claimant from receiving benefits, effective October 28, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and, in the alternative, disqualifying the claimant from receiving benefits, effective October 28, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to October 28, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed May 20, 2022 (), the Administrative Law Judge did not reach the initial determination of misconduct and modified the initial determination of voluntary separation, to be effective November 23, 2021, and, as so modified, sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed as a registered nurse for the employer, a hospital, for approximately five years. She was assigned to the medical/surgical unit as an in-patient nurse.

In August 2021, the employer first notified employees, via email, that all employees were to be vaccinated against Covid-19 by September 27, 2021. If employees were not vaccinated by that date, the employer would place the employee on a ninety-day leave of absence. At the end of the ninety-day leave of absence, the employee, if still unvaccinated, would be discharged.

The claimant requested a medical as well as a religious exemption from the vaccination requirement. The claimant was pregnant and concerned about the effects of vaccination on her pregnancy. When she asked her doctors about vaccination for Covid-19, however, her doctors recommended that she get vaccinated. She felt, however, that her doctors offered conflicting advice about which vaccine was the safest or most appropriate for her situation. The employer subsequently denied the claimant's request for a medical exemption by letter of September 13, 2021. Her religious exemption, based upon her objection to the use of fetal cells, was approved in September 2021. Later, the hospital, after advising the claimant that her position as a registered nurse on the medical/surgical unit did not allow for remote work, revoked the religious exemption.

The claimant was on paid family medical leave to care for her mother, from October 27, 2021, through January 20, 2022. The claimant planned to return to work thereafter. When the claimant reached out to the employer on January 22, 2022, to resume her employment, the employer advised her that she had to be vaccinated. The employer afforded the claimant an additional thirty days to comply with the mandate until February 20, 2022. The claimant refused to accept vaccination. Consequently, the employer discharged the claimant as of February 20, 2022, for declining the vaccination.

OPINION: The credible evidence establishes that the claimant's employment ended because she refused to receive the COVID-19 vaccination, a condition of her continued employment. The claimant was aware of the requirement and its applicability to her employment as a healthcare worker. The claimant was also aware that she could not continue her employment without complying with the mandate.

A provoked discharge occurs when a claimant voluntarily violates a legitimate, known obligation, leaving the employer no choice but discharge. A provoked discharge is considered a voluntary leaving of employment without good cause and constitutes a disqualification from the receipt of benefits. (See Matter

of DeGrego, 39 NY2d 180 [3d Dept.1976]).

In the case herein, the obligation in question was compliance with the employer's vaccine requirement. The requirement was put in place to abide by New York State's mandate that all healthcare workers be vaccinated against COVID-19 during the worldwide pandemic. Courts have long held that New York State has the authority to regulate public health, including mandating vaccination to curb the spread of disease. (See *Matter of Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601 [2018], which upheld mandated annual influenza vaccinations for children attending childcare programs in New York City; *Matter of C.F. v. New York City Dept of Health & Mental Hygiene*, 191 AD3d 52 [2d Dept 2020], holding that a municipal agency had the authority to require immunizations of adults in an area where there was an outbreak of measles if authorized by law; and *Matter of New York City Mun. Labor Comm. v. City of New York*, 73 Misc.3d 621 [Sup. Ct. N.Y. Cnty. 2021], where the Court declined to grant a temporary restraining order of the implementation of the New York City Department of Education's COVID-19 vaccine mandate for its employees, noting that there was no dispute that the Department of Health and Mental Hygiene had the authority to issue the mandate and that the Court "...cannot and will not substitute [others'] judgment for that of New York City's public health experts," citing *New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82 v. Cuomo*, 64 NY2d 233, 237-40 [1984]).

As a result of the severity of the ongoing COVID-19 crisis and healthcare providers' need to protect the health of employees and patients, the emergency regulation, requiring all healthcare workers to be vaccinated against COVID-19, was justified by a compelling governmental interest. Therefore, we find that the employer's requirement that the claimant be vaccinated was a legitimate, known obligation and that the employer had no choice but to end the claimant's employment when she declined the vaccination.

Insofar as the claimant alleges, on appeal, that the mandate was a substantial change to the terms and conditions of her employment, a provoked discharge has been found even when the obligation arose after hire. (See Appeal Board No. 551483, as citing Appeal Board No. 420924). The claimant's decision to forgo a COVID-19 vaccination, despite the mandate to do so, and her awareness of the consequences for failing to do so, left the employer no choice but to terminate the claimant's employment.

We further find, as to the claimant's medical exemption, which the employer denied, the claimant admitted that her doctors recommended she seek vaccination against Covid-19. Significantly, we find that the claimant offered no medical certification that the vaccination was detrimental to her health due to pre-existing conditions so to qualify for a medical exemption under law. (See NYCRR § 2.61 [d] [1])

As to her objection based upon religious concerns, the Supreme Court of the United States has held that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." (See *Employment Div. v. Smith*, 494 US 872, 879 [1990]). The Court determined that, so long as the law is neutral and not aimed at a specific religion, generally applicable, and pertaining to an area of law that the government can regulate, it cannot be preempted by a religious practice. There is no allegation that the state cannot regulate the healthcare industry, that the law is not generally applicable to those in that industry, nor that it targets a specific religion.

Further, the Second Circuit, in *We the Patriots USA, Inc. v. Hochul*, 2021 U.S. App. LEXIS 32921 (2d Cir 2021), upheld New York's COVID-19 vaccine mandate for hospital employees without religious exemptions. Additionally, the U.S. Supreme Court denied an application for injunctive relief in a challenge to New York State's law removing religious exemptions from its COVID-19 vaccine mandate for hospital workers. *Dr. A. v. Hochul*, 142 S. Ct. 552 (U.S. December 13, 2021) (No. 21A145), cert. denied 142 S. Ct. 2569 (U.S. June 30, 2022) (No. 21-1143).

Finally, even if the doctrine of provoked discharge did not apply, the Court has held that a claimant, who fails to take a step that is reasonably required for continued employment, has left employment without good cause. (See *Matter of Wackford*, 284 AD2d 770 [3d Dept 2001]). As the claimant was aware that her refusal to get vaccinated would result in separation from employment, we conclude that the claimant separated from her employment under disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is modified as follows and, as so modified, is affirmed.

The initial determination, disqualifying the claimant from receiving benefits, effective October 28, 2021, on the basis that the claimant voluntarily

separated from employment without good cause, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER